No. 72

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

J. D. SHELLEY ET AL., PETITIONERS,

vs.

LOUIS KRAEMER ET AL., RESPONDENTS.

On Writ of Certiorari to the Supreme Court of Missouri

APPLICATION FOR LEAVE TO FILE BRIEF AMICUS AND BRIEF AMICUS CURIAE ON BEHALF OF THE CIVIL LIBERTIES DEPARTMENT OF THE GRAND LODGE OF ELKS, I. B. P. O. E. W.

WILLIAM C. HUESTON,
of the District of Columbia Bar,
of Counsel.

PERRY W. HOWARD,
613 F St., Northwest, Washington, D. C.,
Counsel for Civil Liberties Department of the Grand Lodge of Elks, I. B. P. O. E. W., Amicus Curiae.

SISSON PRESS, 105 South Ninth Street, St. Louis 2, Mo.—CHestnut 5956

INDEX.

	PAGE
Stipulation of Permission to File Amicus Curiae Brief	iii
Reasons for Filing Brief Amicus	iv
Amicus Curiae Brief in Support of Review on Writ of Certiorari to Supreme Court of Missouri	1
Statement of Case	1
Summary of Argument	7
Argument	12
I. Applicable principles of contract law and statutes derived from Civil Rights Act of 1866, and rulings of courts thereon discussed	12
II. Enforcement by court process is state action forbidden by Fourteenth Amendment	15
III. Ruling of Supreme Court of Missouri constitutes denial of equal protection of laws	17
Conclusion	19

Table of Authorities Cited.

Cases:

Act of Chapultepec, United Nations Charter	7
American Federation of Labor v. Swing, 312 U. S. 321	9
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673	9
Buchanan v. Warley, 245 U. S. 60	5, 7, 9, 10, 11, 14, 15, 16
City of Richmond v. Deans, 281 U. S. 754	14
Civil Rights Cases, 109 U. S. 3	7, 10, 13
Clyatt v. U. S., 197 U. S. 207	13
Const. of Mo., Art. 1, Secs. 2, 10, 14	10, 17
Dettloff v. Hammond, Standish & Co. (Mich.), 161 N. W. 949	16
Ex Parte Virginia, 100 U. S. 313	9, 15
Gandolfo v. Hartman, 49 F. 181	5, 11, 16

INDEX.

Table of Authorities Cited (Continued).

Cases (Continued):	PAGE
Harmon v. Tyler, 273 U. S. 668	14
Kraemer v. Shelley (Mo.), 198 S. W. (2d) 679	17
Lehigh Valley R. Co. v. United Lead Co. (N. J.), 133 A. 290	16
Roberts v. Criss, 266 F. 296	8, 16
Schibi v. Miller (Mo.), 268 S. W. 434	8
Screws v. U, S., 325 U. S. 91	7, 11
Slaughter-House Cases, 16 Wall. 36	11, 13
Sprague v. Rooney (Mo.), 44 S. W. 1114	16
Steele v. L. & N. Ry. Co., 65 S. Ct. 225	11
U. S. v. Morris, 125 F. 322	7, 11, 14
U. S. Rhodes, 1 Abb. 28, 27 Fed. Cas. No. 16,151	14
Virginia v. Rives, 100 U. S. 313	7, 10, 13
Yick Wo v. Hopkins, 118 U. S. 356	19

Texts and Miscellaneous:	PAGE
Pollack on Contracts, Sec. 9, Note 2, p. —	7
13 Corpus Juris Sec. (Contracts), Sec. 380	8
17 C. J. S., p. 547, Sec. 194	8, 16
17 C. J. S., pp. 545, 555, Secs. 191, 201	16

Constitution, Statutes, and Treaties:	
Thirteenth Amendment	13
Fourteenth Amendment	9, 10, 13, 15
Fifteenth Amendment	13
Civil Rights Act, 1866	12, 14
Tit. 8, U.S.C.A., Sec. 41	7, 10, 12, 14, 16
Tit. 8, U.S.C.A., Sec. 42	7, 12, 14, 16
Tit. 8, U.S.C.A., Secs. 43, 47	11, 12
Tit. 18, U.S.C.A., Sec. 51	7, 10, 11, 12
Tit. 18, U.S.C.A., Sec. 52	7, 11, 12

STIPULATED PERMISSION TO FILE BRIEF AS AMICUS CURIAE.

UNITED STATES SUPREME COURT.

OCTOBER TERM, 1947.

J. D. Shelley and Ethel Lee Shelley, his wife, and Josephine Fitzgerald, Petitioners,
vs.
Louis W. Kraemer and Fern E. Kraemer, his wife, Respondents.
No. 72

On Writ of Certiorari to the Supreme Court of the State of Missouri.

It is hereby stipulated and agreed that the Civil Liberties Department of the Grand Lodge of Elks, I.B.P.O.E.W., be permitted to file a Brief amicus curiae on the argument in the above-entitled action.

GEO. L. VAUGHN,
Counsel for Petitioners
G. L. SEEGERS,
Counsel for Respondents

.....
Counsel for amicus curiae

Dated September 26, 1947.

REASONS FOR FILING BRIEF AMICUS.

The Independent, Benevolent, Protective Order of Elks of the World is a fraternal organization with a membership of many thousands, mostly colored persons, scattered throughout all the states of the Union, and reaching into the islands of the Caribbean Sea, and to Africa, and other parts of the world. It is maintaining a large number of young people in the colleges and universities of the United States who have won scholarships in oratorical contests in which the Constitution of the United States was the subject under discussion. Beside its fraternal features, the organization maintains an Educational Department and a Civil Liberties Department, as well as a Department of Health.

By reason of the above-mentioned features, over and beyond the purely fraternal relationships, the Elks organization is vitally interested in the questions involved in the case of Shelley v. Kraemer, No. 72, October Term Docket, United States Supreme Court, and in all other cases seeking to secure the civil rights of citizens, particularly colored citizens, of the United States who are suffering the deprivation of them. It has co-operated with the Federal Government in its health and educational program, particularly, in the efforts of the government to reduce illiteracy among its citizens; and its aim and desire in filing this Brief are to be of assistance to the Supreme Court of the United States by pointing out some of the conditions from which its members and others of the millions who belong to the colored race are suffering.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 72

J. D. SHELLEY; ETHEL LEE SHELLEY, HIS WIFE, AND JOSEPHINE FITZGERALD, PETITIONERS,

vs.

LOUIS KRAEMER AND FERN W. KRAEMER, HIS WIFE, RESPONDENTS.

BRIEF FOR THE CIVIL LIBERTIES DEPARTMENT OF THE GRAND LODGE OF ELKS, I. B. P. O. E. W., AS AMICUS CURIAE.

In Support of Review on Writ of Certiorari to the Supreme Court of Missouri

STATEMENT.

There is now pending before this Court for review on petitions for a writ of certiorari to the Supreme Court of Missouri the case of J. D. Shelley and Ethel Lee Shelley, his wife, petitioners, v. Louis Kraemer and Fern W. Kraemer, his wife, respondents, No. 72, on the October

Term, 1947, Docket, in which the writ was granted on the 23rd day of June, 1947. The case involves the right of colored persons in the City of St. Louis to buy and occupy property as a residence which is covered by a restriction prohibiting its sale to, or use and occupancy by persons not wholly of the Caucasian race, particularly Negroes and Mongolians.

The persons who sold the property were willing sellers, and the petitioners were willing and able buyers.

The essential part of the restrictive agreement, which was entered into on the 16th day of August, 1911, and was to run for a period of fifty years from said date, reads as follows:

> "This contract of restrictions made and entered into by the undersigned, the owners of the property fronting on Labadie Avenue in Blocks 3710-B and 3711-B between Cora Avenue on the west and Taylor Avenue on the east, Witnesseth: That for and in considerations of one dollar and (fol. 24) other valuable considerations paid by the undersigned, one to the other, the receipt of which is hereby acknowledged, each and every one of the undersigned persons hereby contract and agree with the other and for the benefit of all to place, and do place and make upon the Real Estate fronting on Labadie Avenue running back to the alley on the north and south sides of Labadie Avenue between Taylor Avenue and Cora Avenue, a restriction, which is to run with the title of said property in favor of each and every one of the undersigned parties, and their assigns and legal representatives and successors as the owners of this property, which shall not be removed except by the consent of all of the property owners by some instrument or deed, made and executed and put of record, the said property is hereby restricted to the use and occupancy for the term of Fifty (50) years from this date,

so that it shall be a condition all the time whether recited and referred to or not in subsequent conveyances and shall attach to the land as a condition precedent to the sale of the same, that hereafter no part of said property or any portion thereof shall be, for said term of Fifty years, occupied by any person not of the Caucasian race, it being intended hereby to restrict the use of said property for said period of time against the occupancy as owners or tenants of any portion of said property for resident or other purpose by people of the Negro or Mongolian race. It is further contracted and agreed that upon a violation of this restriction either one or all of the parties to this agreement shall be permitted and authorized to bring suit or suits at law or in equity to enforce this restriction as to the use and occupancy of said property in any court or courts and to forfeit the title to any lot or portion of lot that may be used in violation of this restriction for the benefit of each and every person that may now or hereafter, after the recording of this restriction, become the owner of any property on said street. To have and to hold each to the (fol. 25) other their said property, subject, however, always, and under all conditions to the terms of this restriction, each warranting to the other the compliance in every respect of the above restrictions. In Testimony whereof, the parties hereto have signed their name and seal this, the 16th day of February, 1911" (R. 19, 20).

The respondents, who did not sign the agreement but claimed their right to bring the injunction action to enforce the same by reason of their ownership of one of the parcels of property covered thereby, filed their suit in the Circuit Court of the City of St. Louis, alleging violation of said restrictive agreement by the vendor of the property known as 4600 Labadie Avenue in said city, by reason of the sale thereof to the petitioners, Shelley, and their occupancy of it as owners, and prayed the Court, among other relief asked for, as follows:

(c). That upon final hearing herein this honorable Court make permanent and perpetual its injunction restraining and enjoining defendants Shelley herein from taking possession of, or entering into, or residing in, the property known as 4600 Labadie Avenue; that the defendant, Josephine Fitzgerald, be restrained and enjoined from conveying during the period while the restriction agreement aforesaid remains in force and effect, said property in violation of the agreement aforesaid.

(d). That the title to said property be divested out of defendants, J. D. Shelley and Ethel Shelley, his wife, and vested in their immediate grantor or grantors, or in such person or persons wholly of the Caucasian race, and not of the Negro or Mongolian race, as the Court may determine.

(e). That said restriction agreement above mentioned be declared by the Court to be valid and in full force and effect (R. 7, 8).

Petitioners, who prevailed in the trial Court, pleaded in their Return and Answer (R. 9, 16), that the agreement in question was illegal and void, therefore unenforceable, because:

1. It is contrary to the provisions of Sec. 42 of Tit. 8, U. S. Code, and interferes with their rights as citizens of the United States under said section (par. 5).

2. It violates rights conferred on them by Sec. 41 of Tit. 8 of the U. S. Code, to make and enforce contracts, and to the equal proteection of laws regarding the ownership and use of property, which white citizens of the State of Missouri have applied to similar transactions (par. 6).

3. That the plaintiffs seek action by the State of Missouri, through court process to uphold and enforce said

agreement, which is forbidden by Section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, or to deprive anyone of life, liberty, or property without due process of law, or to deny to anyone within its jurisdiction the equal protection of the law (par. 8).

4. Invoked the application of the principles of law enunciated in Gandolfo v. Hartman, 49 Fed. 181, and in Buchanan v. Warley, 245 U. S. 60, in connection with the enforcement of laws and agreements restricting the use of real property against colored persons based solely on their race (par. 12).

5. Alleged conspiracy on the part of plaintiffs (respondents here) and other persons, including the members of the St. Louis Real Estate Exchange, to form ghettoes and to compel colored persons to live therein, which had resulted in overcrowding and detriment to their physical, moral and financial welfare, and had imposed unequal financial burdens on them than were suffered by white citizens in securing housing accommodations, all because of their race and color (pars. 13, 15).

Although the trial Court found in favor of the petitioner here and dismissed the petition of the respondents, nevertheless it ruled, in the memorandum opinion filed with the decree, as follows:

> "The contention that the restriction violates the constitutions of Missouri and of the United States and the federal civil rights statutes, and is against public policy, are ruled against defendants, * * *" (R. 144).

6. That it violates the public policy of the United States as set forth in the above-mentioned constitutional and statutory provisions.

All of the aforesaid federal questions were presented to the Supreme Court of Missouri in the Brief and Argument of the petitioners filed and made in and before said Court on appeal (R. 149, 153), and in their motion for rehearing (R. 160, 168).

The Supreme Court of Missouri, sitting en banc, reversed the ruling of the trial Court dismissing the petition of the plaintiffs, and upheld the validity of said agreement in its opinion and ruling against the petitioners on all of the federal questions involving said federal onstitutional and statutory provisions, and the contentions of the petitioner in regard thereto, and ordered the trial Court to set aside its said order, and to reinstate the petition, and grant the relief therein prayed for by the respondents here.

From that ruling and judgment the petitioners duly prayed for certiorari to this Court, and the same was granted.

SUMMARY OF THE ARGUMENT PRESENTED.

I.

The agreement involved in this case is invalid because it is lacking in the essential element of enforceability by the courts, and is illegal and void because its execution requires depriving petitioners of fundamental civil rights secured to them by the Constitution and laws of the United States, and is contrary to the public policy of the United States, as set forth in said Constitutional and statutory provisions and statutes, and the decisions of the Supreme and other Federal Courts of authority construing and applying them to the questions involved in this cause, and to the treaty provisions of the Act of Chapultepec and of the United Nations charter regarding the equality and personal dignity of human beings and the preventing of discrimination against them on account of race or religion.

1. One of the essential elements of a valid contract is its enforceability in a court of law or equity.

Pollack on Contracts, Sec. 9, Note 2, p . . .

2. The civil rights declared and protected by Sections 41 and 42 of Title 8 of the United States Code, and the Fourteenth Amendment to Constitution of the United States are fundamental rights of citizens of the United States, and of all persons within its jurisdiction; and Congress, in order to secure the same and to prevent deprivation thereof, has made a conspiracy to deprive, or cause to be deprived, of said civil rights, punishable under the criminal laws of the United States.

Virginia v. Rives, 100 U. S. 313, 317.
Civil Rights cases, 109 U. S. 3, 22.
Buchanan v. Warley, 245 U. S. 60, 75 et seq.
Sec. 51 (Criminal Code, Sec. 19), Tit. 18 U. S. Code.
Sec. 52 (Criminal Code, Sec. 20), Tit. 18 U. S. Code.
U. S. v. Morris, 125 Fed. 322, cited with approval in Screws v. U. S., 325 U. S. 91.

3. An agreement involving a civil wrong against third persons is illegal and void, although such wrong is not an indictable offense, and Congress has made the subjecting, or causing to be subjected, of any citizen, or other person within the jurisdiction of the United States, to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws of the United States, a civil wrong for which actions at law and in equity, or other proper proceedings, will lie to redress the same.

Sec. 43, Tit. 8, U. S. Code.
17 C. J. S., 547, Sec. 194.
Roberts v. Criss, 266 F. 296, 302.

4. "Public policy is that principle of law which holds that no person can lawfully do that which has a tendency to be injurious to the public or against public good, which may be designated, as it sometimes has been, the policy of the law or public policy in relation to the administration of the law" (13 C. J., Sec. 360, p. 425), is a definition of the term "public policy," which aptly fits the facts and circumstances in this case. The test of whether or not a contract is against public policy is, "the evil tendency of the contract," and not the actual injury to the public in a particular instance."

13 C. J., Sec. 360, supra.
Roberts v. Criss, supra.
Schibi v. Miller (Mo.), 268 S. 434, 435.

Not only does the agreement in question here have the "tendency to accomplish evil and immoral purposes," but the trial Court found that the evil and immoral purposes pleaded had actually been accomplished in the City of St. Louis by means of said agreement and others of similar import (R. 141, par. 7, of Findings of Fact; see also, testimony of witnesses, pp. 128, 134, 135), and the Supreme Court of Missouri, in its opinion, stated that:

"Such living conditions bring deep concern to everyone, and present a grave and acute problem to the entire community. Their correction should strikingly challenge both governmental and private leadership. It is tragic that such conditions seem to have worsened although much has been written and said on the subject from Coast to Coast * * *" (R. 159).

II.

The enforcement of such an agreement as above described is forbidden by the provisions of Section 1 of the Fourteenth Amendment, as the enforcement of laws which abridge the privileges and immunities of citizens of the United States and constitute depriving of property and property rights, and the denial of the equal protection of the laws, within the meaning of said section.

1. The first inhibitory provision of Section 1 of the Fourteenth Amendment forbids "any state to make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

U. S. Const., 14th Amend., Sec. 1.

2. The enforcement by court process of the agreement under consideration here is State's action forbidden by the Fourteenth Amendment, and constitutes the depriving of property without due process of law; and the denial of the equal protection of the laws, within the meaning of that amendment.

U. S. Const., 14th Amend., supra.
Ex parte Virginia, 100 U. S. 339, 347.
Brinkerhoff-Faris Co. v. Hill, 281 U. S. 673.
Twining v. New Jersey, 211 U. S. 78.
Buchanan v. Warley, 245 U. S. 60.
American Federation of Labor v. Swing, 312 U. S. 321.

III.

The refusal of the Supreme Court of Missouri to grant petitioners relief from the conditions arising out of the enforcement of restriction agreements which imperiled their moral and physical welfare and placed added financial burdens, handicaps, and other exactions beyond those to which white citizens in Missouri are subjected, constitutes a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

1. Petitioners are citizens of the United States and of the State of Missouri wherein they reside, and are entitled, under the provisions of Section 41 of Title 8 of the United States Code, to the same right to make and enforce contracts, and to be parties in actions in the courts of Missouri, and to "the full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens of the state."

Virginia v. Rives, 100 U. S. 313, 317.
Buchanan v. Warley, 245 U. S. 60.
Civil Rights cases, 109 U. S. 3, 22, 23.
Const. of U. S., Sec. 1, 14th Amend.
Secs. 51, 52, Tit. 18, U. S. Code.
Const. of Missouri, Art. I, Secs. 2, 10, 14.

2. The ruling of the Supreme Court of Missouri, that correction of the conditions of peril to the health, moral and physical well-being, and the increased financial burdens placed upon petitioners and other members of the Negro race by reason of the use and enforcement of the restrictions contained in the agreement under consideration, and similar ones in agreements having the same objective, purposes and import, is beyond the authority

of the courts, constitutes a denial to the petitioners of rights secured to them by the Constitution and Laws of the United States, and the denial of equal protection of the laws, as well as due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

See authorities cited under III, 1.
Steele v. Louisville & Nashville Ry., 65 S. Ct. 225.
Slaughter-House cases, 16 Wall. 36, 71.
Buchanan v. Warley, supra.
Gandolfo v. Hartman, 49 Fed. 181.

3. The agreement in question here constitutes a conspiracy between the signers thereof, their privies, and the officers and members of the St. Louis Real Estate Exchange, willfully to deprive the petitioners, and other members of the Negro and Mongolian races in the City of St. Louis, or to subject them to the deprivation, of rights, privileges and immunities secured to them by the Constitution and laws of the United States, and for which offense the laws of the United States, gives both criminal and civil redress.

Secs. 51 and 52, Tit. 18, U. S. Code.
Secs. 43 and 47 (3), Tit. 8, U. S. Code.
United States v. Morris, 125 Fed. 322.
Screws v. United States, 325 U. S. 91.

ARGUMENT.

I.

Underlying the questions involved in this case, and affecting in a vital manner the application of the Constitutional and statutory provisions of law applicable to the facts, are the basic principles of contract law. The illegality, and hence the unenforceability, of the agreement in question, must be considered in the light of the federal Constitutional and statutory provisions relating to the rights, privileges and immunities involved in the case.

Sections 41 and 42 of Title 8 of the U. S. C. A., which are derived from the Civil Rights Act of April 9, 1866, declare rights, privileges and immunities of citizens of the United States which are protected and secured by the Fourteenth Amendment to the Constitution, and by Sections 51 and 52 of Title 18 of the Code, which were, respectively, Sections 19 and 20 of the Criminal Code. Sections 43 and 47 of Title 8, U. S. C. A., also furnish protection and means of redress for civil injuries arising from the violation of rights and privileges named in Sections 41 and 42, supra.

The title of the Civil Rights Act of 1866 was: "An Act to Protect All Persons in the Enjoyment of their Civil Rights, and furnish Means of their Vindication." This Court construed the provisions of that Act now contained in Sections 41 and 42, supra, saying:

> "Congress * * * undertook to wipe out the burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are essential to civil freedom (naming those enumerated in the wto sections of the

Code) * * * and to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery." (Civil Rights cases, 109 U. S. loc. cit. 22.)

In Virginia v. Rives, 100 U. S. 313, 317, this Court declared:

> "The plain meaning of these statutes, as of the Constitution which authorized them, was to place the colored race, in regard to civil rights, upon the level with whites."

And in the Slaughter-House Cases, 16 Wall. 36, at page 71, Mr. Justice Miller, in discussing the purpose of the adoption of the three Civil War Amendments (Thirteenth, Fourteenth and Fifteenth), declared it to be:

> "the freedom of the slave race, the security and firm establishment of that freedom, and the protection of the newly-made freeman and citizen from the oppression of those who had formerly exercised unlimited dominion over them."

In this regard, it is well to remember that the Civil Rights Act of April 9, 1866, was re-enacted after the adoption of the Fourteenth Amendment in aid of its enforcement and purposes.

In the Civil Rights cases, supra, at page 23, this Court held:

> "The legislation, so far as necessary or proper to eradicate the forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by state legislation or not."

This ruling was repeated by this Court in Clyatt v. U. S. 197, U. S. 207, 217.

A reading of the recital of the evils and disabilities which were attendant upon the enslaved race, as well as upon those persons of that race who were not bondmen, as set out in U. S. v. Rhodes, 1 Abb. 28, 27 Fed. Cas. No. 16151, and in U. S. v. Morris, 125 F. 322, as well as the Congressional debates attendant upon the passage of the Civil Rights Act and the Civil War Amendments (Cong. Globe, Vols. 69, 211 et seq.; id. Vol. 70, 1365 et seq.), will shed light upon the purposes which Congress had in enacting the Civil Rights Act of 1866, and the other laws of that period relating to the civil rights of members of the colored race.

This Court in Buchanan v. Warley, 245 U. S. 60, construed the provisions of Sections 41 and 42, supra, in connection with the provisions of Section 1 of the Fourteenth Amendment, in a similar manner to the former construction of them by it, and applied constitutional and statutory provisions to the question of prohibiting the acquiring and occupancy of property by colored citizens contained in legislation of a municipality of the State of Kentucky, and ruled that legislation to be in violation of the provisions of the Fourteenth Amendment, and an unlawful exercise of the police power of the state. Later, this Court ruled ordinances having a similar purpose invalid and violative of that Amendment upon the authority of Buchanan v. Warley; Harmon v. Tyler, 273 U. S. 668; City of Richmond v. Deans, 281 U. S. 281, U. S. 754.

In the Buchanan Case the Court said: "The concrete question here is: May the occupancy, and necessarily, the purchase and sale of property of which occupancy is an

incident, be inhibited by the State, or by one of its municipalities, solely because of the color of the proposed occupant of the premises?"

II.

Enforcement by Court Process State Action Forbidden by Fourteenth Amendment.

That is the identical question involved in this case, so far as the State of Missouri is concerned. It has ruled that the sale and occupancy of the property in question to the petitioners is void, because of the restriction against them in the agreement under consideration here. Upon a breach of that restriction by one of the privies (not a party) to the agreement, by willingly selling and conveying the property in question to a willing and able buyer, respondents invoked the power of the State of Missouri, by means of court process, to enforce its restrictions against petitioners and to divest title to the property out of them, and restrain them from occupying the same solely because of their race. This is state action on the part of the State of Missouri forbidden by the Fourteenth Amendment, which provides: "No State shall * * * enforce any law which shall abridge the privileges and immunities of citizens of the United States." The only difference in the situation here, and that in Buchanan v. Warley, is that here, it is prohibition by court process, while there it was prohibition by legislation.

It makes no material difference through which of its agencies a state may act, or which of its powers it may exercise in the acting: "Whoever by virtue of public position under a state government deprives another of property, life or liberty without due process of law, or denies or takes away equal protection of the law, violates the constitutional inhibition; and as he acts in the name of

the state, is clothed with the state's power, his act is that of the state," said this Court in ex parte Virginia, 100 U. S. loc. cit. 347. In Buchanan v. Warley, supra, the Court said: "The attempt to prevent the alienation of the property in question to a person of color * * * is in direct violation of the fundamental law enacted in the Fourteenth Amendment preventing state interference with property rights except by due process of law."

It is the result of the state's action, and not the method by which that result is brought about, which is material in the consideration of the questions in this case. Petitioners invoked the rulings of this Court in the Buchanan Case in the pleadings in the courts below, as well as the ruling and rationale underlying the decision in the case of Gandolfo v. Hartman, 49 F. 181.

Under the basic principles of contract law, an agreement, which in its execution involves the violation of law, or of a valid statute, or tends to interfere with the rights of citizens, particularly, those secured to citizens of the United States by the Constitution or laws of the federal government, or requires the doing of a civil wrong against third persons, is illegal and void, and contrary to public policy. 17 C. J. S., pp. 545, 555, Secs. 191, 201; Lehigh Valley R. Co. v. United Lead Co. (N. J.), 133 A. 290; Sprague v. Rooney (Mo.), 44 S. W. 1114; Dettloff v. Hammond, Standish & Co., 195 Mich. 117, 161 N. W. 949; Roberts v. Criss, 266 F. 296.

The agreement under consideration violates the letter and spirit of Sections 41 and 42 of Title 8 of the Code, and requires in its execution the interference with rights secured to the petitioners by said statutes and by the Fourteenth Amendment to the Constitution of the United

States. By its use and enforcement, together with the use and enforcement of similar agreements having the same purpose, by means of court process, the colored citizens of St. Louis, Missouri, have been forced into a ghetto which has become over-crowded, resulting, as the trial Court found, * * * "was detrimental to their moral and physical well-being" (R. 141). That is the condition which confronts the nearly twenty millions of colored people in all the urban centers of the United States. Its spread has reached from ocean to ocean, and is on the increase. Kraemer v. Shelley, 198 S. W. (2d) 679. Among these colored people are nearly a half million members of the Independent, Benevolent Protective Order of Elks of the World, whose health and moral well-being are being endangered, along with millions of other colored citizens throughout the nation, who, in their turn, are endangering the health and lives of those with whom they come into contact, regardless of the color of their skins. Undoubtedly, an agreement under whose terms such results are not only possible but were actually accomplished, resulting in the injuries shown by the record, is illegal and unenforceable as being contrary to public policy.

III.

Ruling of Supreme Court of Missouri Constitutes Denial of Equal Protection of Laws.

The refusal of the Supreme Court of Missouri to grant petitioners relief from the dire conditions which they and other colored citizens of St. Louis were suffering by reason of the use and enforcement of this and other agreements containing similar restrictions against them in carrying out a general plan to segregate colored citizens, and of which the agreement under consideration was a

part, was a direct violation of Section 14 of Article I of the Constitution of Missouri (1945), which provides:

> "That the courts of justice shall be opened to every person, and certain remedy afforded for every injury to person, property, or character" * * *.

It is also in violation of the spirit of the provision of Section 2 of Article I of said Constitution of Missouri (Bill of Rights), which reads: "That all persons are created equal and are entitled to equal rights and opportunities under the law; that to give security to these things (including natural right to life, liberty, the pursuit of happiness and the enjoyment of the games of their own industry) is the principle office of government", * * * In view of the foregoing provisions of the Bill of Rights of the Constitution of Missouri, the refusal of the Supreme Court of Missouri to grant petitioners relief from the above-named conditions constitutes a deprivation of property without due process of law, and a denial of the equal protection of the laws within the meaning of the Fourteenth Amendment to the Constitution of the United States.

In Yick Wo v. Hopkins, 118 U. S. 356, 370, this Court declared:

> "The fundamental rights to life, liberty, and the pursuit of happiness, considered as individual possessions, are secured by those maxims of constitutional law which are monuments showing the victorious progress of the race in securing the blessings of civilizations under the rights of law, * * * for, the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in a country where freedom prevails, as being the essence of slavery."

CONCLUSION.

It is respectfully submitted that the invalidity and unenforceability of agreements and deeds containing restrictions against the ownership or occupancy of real property, based solely on race or color, should be determined by this Court in this case, and that their enforcement by court process be declared violative of the Fourteenth Amendment.

Respectfully submitted,

WILLIAM C. HUESTON,
of the District of Columbia Bar,
of Counsel.

PERRY W. HOWARD,
613 F St., Northwest, Washington, D. C.,
Counsel for Civil Liberties Department of the Grand Lodge of Elks, I. B. P. O. E. W., Amicus Curiae.